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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Cabell-Wayne Association of the Blind, Inc.

v.

L.F. Fowler

Opposition No. 91122156
to Application Serial No. 75937529

Monika J. Hussell of Jackson Kelly PLLC for Cabell-Wayne
Association of the Blind, Inc.

L.F. Fowler, *pro se*.

Before Simms, Chapman and Bucher, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

L.F. Fowler (a U.S. citizen and resident of Huntington,
WV) seeks to register on the Principal Register the composite
mark shown below:



for services recited as "providing information on the blind and blind focused social service agencies and blind focused service organizations and associations via the internet, mail or telephone," in International Class 42.¹

Registration has been opposed by Cabell-Wayne² Association of the Blind, Inc. (a West Virginia non-profit corporation) on the ground that it has previously used the initialism CWAB and the following logo:



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Opposer asserts that these marks, individually and combined, have been used since long prior to applicant's filing date herein. Opposer then asserts that applicant's mark, if it is used in connection with his recited services, so resembles opposer's previously used service marks and

¹ Application Serial No. 75937529 was filed on March 6, 2000 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce.

² The record shows that Cabell County (Huntington) and Wayne County are located in the western part of West Virginia, close to the Kentucky and Ohio borders.

³ This image is described in opposer's West Virginia state trademark registration for this exact logo as "a blind man and a woman, with the woman using a cane and walking with the man using a dog guide."

trademarks that it would be likely to cause confusion, to cause mistake, or to deceive.

Applicant, in his answer, denied the salient allegations of the notice of opposition.

A trial was conducted in accordance with the Trademark Rules of Practice. The record consists of the pleadings; the file of the opposed application; opposer's trial deposition of opposer's Executive Director, Paul R. Slone, with exhibits, and of applicant, Mr. Lamont ("Monty") Frederick Fowler, with exhibits; and applicant's trial deposition of Mr. Slone. Only opposer filed a brief on the case and no oral hearing was requested.

Based upon careful consideration of the testimony and other evidence properly of record in this opposition proceeding, we hold that opposer has met its burden of proof with regard to its likelihood of confusion claim under Section 2(d) of the Lanham Act.

Opposer's priority

The evidence of record establishes that opposer has used the image of two people walking with a guide dog (often referred to in this record as opposer's "logo") as a trademark and as a service mark since at least as early as 1989.⁴ Also

⁴ According to the testimony of opposer's Executive Director, this mark was adopted in the "fall of 1989." Opposer's Trial deposition of Paul R. Slone (hereinafter, "Slone"), pp. 6 - 8, 11 -

according to the testimony of opposer's Executive Director, the initialism CWAB was adopted "about that time [1989]" (Slone, p. 6) to identify opposer, its products and services.⁵ The record shows that both marks have been used continuously to the present (Slone, p. 6). These are dates well prior to the earliest date upon which applicant can rely, i.e., its March 6, 2000 application filing date. Hence, we find that opposer has established its priority.

Likelihood of Confusion

We turn then to the remaining issue before us, namely, the question of likelihood of confusion. In the course of determining the question of likelihood of confusion herein, we have followed the guidance of In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973). The du Pont case sets forth each factor that should be considered, if relevant information is of record, in determining likelihood of confusion. Moreover, we note that in any likelihood of confusion analysis, two key

19, and Exhibits 2, 5, 6, and 7, including the August 1990 "Guide Page" showing use of the logo.

⁵ On the other hand, we note that opposer's 1990 newsletter of record referred to the organization as "CWSVI" ("Cabell-Wayne Services for the Visually Impaired"). In any case, clearly dated usage of the designation CWAB as of 1997 was demonstrated with documentary evidence in "Guide Page: The monthly newsletter of Cabell-Wayne Association of the Blind, Inc.," October 1997 (Slone, Exhibit 2), and this usage clearly predates applicant's filing date herein.

considerations are the similarities between the marks and the relationships between the goods or services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

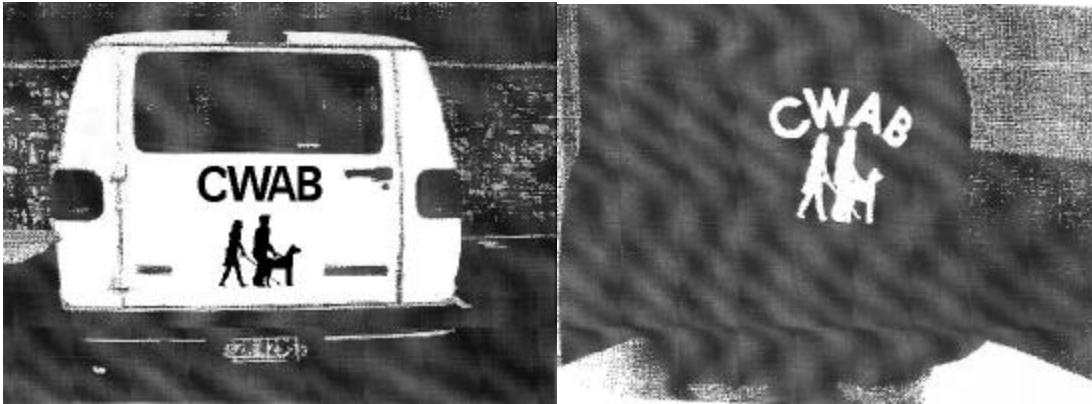
Accordingly, we turn first to the relationship between the services as recited in applicant's application and the goods and services in connection with which opposer's prior marks have been in use as shown through the evidence of record. From the recitation contained in his application papers, applicant intends to provide information about the blind, and about agencies, organizations, and associations focused on the blind. Opposer is an agency whose mission is to help the blind and severely visually impaired achieve maximum independence in a variety of ways. Opposer's activities include the collection and dissemination of information of interest to the blind. (Slone, p. 5; Opposer's Trial deposition of L.F. Fowler (hereinafter, "Fowler"), p. 9) The testimony depositions of Messrs. Slone and Fowler both demonstrate that, indeed, from at least 1999 through 2002, Mr. Fowler's website focused almost exclusively on opposer. (Fowler, pp. 23 - 36) Hence, we find that applicant's recited services are very closely related to the services being provided by opposer.

Moreover, turning to the du Pont factors dealing with the similarity or dissimilarity of established, likely-to-continue trade channels as well as the conditions under which and buyers to whom sales are made, we must presume that applicant's services will move through all of the normal channels of trade to all of the usual consumers of services of the type recited,⁶ and that this would include the same class of consumers that are being served by opposer's services. Hence, in looking to these two related du Pont factors, we conclude that the channels of trade and classes of purchasers will be the same.

As to the marks, opposer uses the initialism CWAB and the logo both separately and together. The logo appears in opposer's monthly publication, invitations for special occasions (Slone, pp. 12 - 13), on the side of its shuttles, vans and other vehicles, on its concession stand in Marshall University's football stadium, on billboards and placards (Slone, pp. 13 - 16), its bank drafts (Slone, pp. 17 - 18), letterhead (Slone, p. 18), forms for internal usage, and clothing items such as uniforms, hats, T-shirts and jackets (Sloan, Exhibit 2). Many of the above referenced items also show the letters CWAB being used apart from the logo. When

⁶ See Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987).

opposer, as an entity, is mentioned in news publications, it is often referred to simply as "CWAB." (Slone, p. 8). The record also contains undated photographs⁷ showing the two indicators used together on the back of a van and on the front of a cap:



In deriving his composite mark, applicant has inserted a substantially exact representation of opposer's logo into a circle and then added opposer's CWAB initialism beneath it. The only other new matter applicant has added to opposer's two prominent source-indicators is ".org" - a top level Internet domain (TLD) name.

Of course, while we compare the marks in their entireties, the TLD portion of a domain name has no source-

⁷ Q: ... [T]hese are true and accurate pictures, all taken before the filing date of [applicant's] application, is that correct?

A: Yes.
(Slone, p. 19).

⁸ (Slone, p. 19, Exhibit 5).

indicating significance.⁹ Moreover, while the letters CWAB are clearly derived from the initials of opposer's trade name, this initialism would have to be considered an arbitrary designation for its services. Similarly, while the logo may be suggestive of services for those having impaired vision, we have no reason, on this record, to believe this is anything but an image designed specifically by (or for) opposer.

In this context, we find applicant's derivation of a name for his webpage efforts to be particularly disingenuous -- choosing the name "Campaign for Workers Assisting the Blind" supports a CWAB initialism. Similarly, the degree to which applicant's image resembles opposer's logo cannot be explained as coincidental.

In fact, we find applicant's strained testimony on the creation of his design element to be incredulous. The record shows that applicant was the "media and marketing manager" for opposer from 1994 through 1997 (Slone, p. 5; Fowler, pp. 7, 41). Among other responsibilities, this involved implementing the policies of opposer's board of directors as to the correct usage of opposer's trademarks and service marks, editing

⁹ See 555-1212.com, Inc. v. Communication House International, Inc., 157 F.Supp. 2d 1084, 59 USPQ2d 1453 (N.D.CA. 2001); In re Martin Container Inc., 65 USPQ2d 1058 (TTAB 2002); In re CyberFinancial.Net Inc., 65 USPQ2d 1789 (TTAB 2002); and In re Page, 51 USPQ2d 1660 (TTAB 1999). See also, TMEP §§1209.03(m) and 1215.04 (3rd ed. May 2003); and 1 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §7:17.1 (4th ed. 2001).

opposer's monthly newsletter¹⁰ and writing grant applications. (Slone, pp. 5, 20 - 21; Fowler, pp. 9, 68 - 69).

Nonetheless, when asked about the origins of the image contained within the circle of his composite drawing, applicant testified that in spite of his limited computer skills and the fact that he is clearly not an artist, he painstakingly drew this image himself in the "Paint" program of Windows, beginning with crude stick figures and then filling them in until such time as the image "looked like something" (Fowler, pp. 38 - 40).



Opposer's logo



Applicant's image ¹¹

¹⁰ "Guide Page: The monthly newsletter of Cabell-Wayne Association of the Blind, Inc.," October 1997 (Slone, Exhibit 2),

¹¹ In fact, when these two electronic images are laid on top of each other, the pixels match up precisely on most of the image. Contrary to Mr. Fowler's testimony of working from stick figures, it appears much more likely that Mr. Fowler started with an extant electronic image of opposer's logo, and then made minor modifications with his computerized drawing program (e.g., adding a pointed skirt to the woman's dress and enhancing her breasts ("... The woman in [my mark] appears to be more, I guess, well formed and feminine looking..." Fowler, pp. 42 - 43), removing the strap from the top of a whittled-down cane, giving the male figure a haircut, placing one of the dog's front legs a half-step behind the other, and then loping off the dog's raised ears).

However, applicant ultimately admitted that one has to look closely at the two drawings in order to notice the differences (Fowler, p. 53).

In any case, given the close relationship of the respective services and the remarkable similarity of the marks, we find a strong case for likelihood of confusion in the instant case. Furthermore, we must consider that the severely visually impaired face obvious challenges in distinguishing source-indicators by their appearance. Hence, in light of the remarkable similarity between the respective marks herein, we find that the opportunity for potential confusion is substantial.

We turn next to the du Pont factor focusing on the number and nature of similar marks in use on similar goods or services. From the time of filing his answer to the notice of opposition, applicant has referred throughout this trial to several third-party uses of CWAB designations. During trial, applicant proffered a photocopy of a single third-party federal registration. However, there are multiple problems with this showing. First, it is well settled that an extant federal trademark registration alone does not prove actual use of the mark. Second, there are proper ways to make such a registration of record, and applicant failed to do that in this instance. Third, this registration has now expired.

Finally, this particular registration - for the mark "Cwab" for goods identified as "lubricating compound for molds for casting of glass products" - is apropos of nothing as the registration issued for goods completely unrelated to the services involved herein. Because no trademark owner is entitled to property rights *in gross*, the only arguably relevant third-party registrations would be for marks actually shown to be used in the same or related fields of goods or services (e.g., those directed to the blind or other physically handicapped individuals, etc.). Similarly, even if properly entered into the record (which it is not), applicant's Internet evidence of CWAB used in connection with organizations such as "Catholic Wedding Answer Book," "Catholic Workers Association of Bangladesh," "Clean Water for Armand Bayou" and "Cricketers' Welfare Association of Bangladesh" is also totally irrelevant, for the same reasons explained above.¹²

Hence, we find based upon this entire record that both components of applicant's involved mark, which he adopted from his former employer, are arbitrary (CWAB) and/or suggestive

¹² Applicant has even put in evidence of Internet hits for the slightly rearranged letters CAWB (e.g., standing for the "Campaign Against Workplace Bullying Ways"). This too was not properly made of record, and moreover, is irrelevant in determining the issue of likelihood of confusion between applicant's and registrant's marks as applied to their respective services.

(logo), and that individually and together, they are strong source-indicators as applied to goods and services directed to the blind and severely visually impaired.

As to any other facts that may be probative of the effect of applicant's intentions to adopt and use his claimed mark, applicant's history with opposer and the nature of his Internet activities at www.cwab.org between 1999 and 2002 should be mentioned.

It is clear that sometime after Mr. Fowler left his employment with opposer ("CWAB") - a not-for-profit social service agency - he secured *cwab.org* as the domain name for his personal website. In selecting this particular domain name, he chose a combination virtually certain to create confusion with his former employer. In fact, the text of his webpages shows that applicant repeatedly used the designation CWAB as a shorthand reference to opposer. He used the site to make available on the Internet unflattering and disparaging information about opposer. Then, although he never used the composite image that is the subject of this application on his website (Fowler, pp. 37 - 38), in designing his composite service mark and filing this trademark application, he knowingly added a substantially exact representation of opposer's logo to his misleading domain name.

Applicant appears, in part, to justify his various actions (e.g., domain name registration, federal trademark application, etc.) based upon the fact that opposer failed to seek federal trademark or service mark registrations, allegedly was tardy in getting a domain name for its initialism and delayed in producing a working website. Of course, if resources were available for such purposes, it may well have been a wise business practice for opposer to have initiated these steps earlier. Nonetheless, opposer's failure to pursue these steps during the period that applicant was employed with opposer did not leave these valuable properties fair game for applicant's taking upon his departure. Trademark registrations are most beneficial but are not mandatory. Hence, there was certainly no obligation on opposer's part to secure such legal protections, nor does opposer lose its common law rights by failing to pursue registrations.

The testimony taken by the parties focuses, *inter alia*, on applicant's *bona fides*. According to his testimony, applicant fancies himself a whistleblower committed to shining the light of truth into the shady corners of a mismanaged, if not unprincipled, agency. (Fowler pp. 24 - 37) By contrast, opposer views applicant as a disgruntled former employee committed to harassing, and perhaps harming, opposer (Slone,

p. 10; Applicant's deposition of Mr. Slone, pp. 15, 19, 28 - 102, 109 - 114, 126 - 127) However, we need not enter into this fray. The veracity of the many needling allegations contained within applicant's website is irrelevant in the context of our determination under Section 2(d) of the Lanham Act. Applicant's disclaimers and other attempts at vindicating legalese sprinkled among his website content are also irrelevant to our determination herein. Undeniably, applicant's actions, taken as a whole, demonstrate his hostility to opposer as well as a blatant disregard for opposer's intellectual property rights. Accordingly, to the extent that applicant's intentions enter into our likelihood of confusion determination herein under the final du Pont factor, they weigh heavily against applicant.

Decision: The opposition is sustained and registration to applicant is hereby refused under Section 2(d) of the Lanham Act.